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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:)	
)	
IAN GREGORY THOW,)	No. 05-30432
)	
Debtor.)	
)	

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS
BEFORE THE HONORABLE PHILIP H. BRANDT
OCTOBER 29, 2007

Reported by: Robyn Oleson Fiedler
CSR #1931

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A P P E A R A N C E S

For the Debtor:

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1 DIGITALLY RECORDED IN SEATTLE, WASHINGTON

2 OCTOBER 25, 2007

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5 MR. LEAVERTON: Bruce Leaverton representing
6 Wolrige Mahon, the trustee in the matter. Mr. Mike
7 Cheevers is the representative of --

8 THE COURT: Okay. Thank you.

9 MR. McLEAN: Your Honor, John McLean, I'm
10 Canadian counsel for Mr. Cheevers.

11 MR. FOX: Your Honor, Greg Fox of Lane
12 Powell.

13 MR. FEINSTEIN: Larry Feinstein, attorney for
14 the debtor.

15 MS. RILEY: Jessica Riley, I represent
16 Mr. Thow pertaining to the criminal matters.

17 THE COURT: Okay. Thank you. I should also
18 mention that Matt Johnson is also present. He is a law
19 student at Seattle University and is working with Judge
20 Overstreet as an extern and has done some research on
21 these issues as well.

22 Are there press representatives present in
23 the courtroom? Could I ask you each to identify -- why
24 don't you come forward to the podium, because these
25 proceedings are recorded digitally.

1 MS. ARMSTRONG: Okay. I'm Courtney
2 Armstrong, and I'm with CBC News, television news out
3 of Vancouver.

4 THE COURT: Thank you, Ms. Armstrong.

5 MS. CROSBY: Jennifer Crosby, CHEK TV News
6 from Victoria on Vancouver Island. And Kendall Hansen,
7 my photographer, is here as well.

8 THE COURT: I take it his camera is somewhere
9 else?

10 MS. CROSBY: Yes, it is.

11 THE COURT: Okay. Thank you. Oh, sir?

12 MR. DUFFY: My name is Andrew Duffy. I'm
13 with the Times Colonist Newspaper in Victoria.

14 THE COURT: Okay. Thank you, Mr. Duffy.

15 All right. These are -- well, I take it -- I
16 should also say, when we first received inquiry in
17 chambers on Thursday regarding press attendance at this
18 examination, we did advise counsel for the parties, the
19 interested parties, the parties who were of record in
20 the proceeding on this side of the border, so this was
21 not a complete surprise to them. It might not have
22 been anyway.

23 The other thing that I want to put on record
24 is I've just briefly had a conference in chambers with
25 the counsel who identified themselves on the record a

1 few minutes ago, just talking about where we are and
2 what would happen next. And I think what happens next
3 is I'd like each of the parties to indicate on the
4 record both the trustee's position and Mr. Thow's
5 position, and then we'll talk about what we do next.

6 MR. LEAVERTON: Thank you, Your Honor, Bruce
7 Leaverton on behalf of the trustee. The trustee
8 believes that it's in the best interests of the
9 bankruptcy estate in Canada that's being administered
10 that the examination proceed this morning on a private
11 basis and without the press attending it for a variety
12 of reasons, including concerns regarding being able to
13 make that investigation and examination as effective as
14 possible. And the trustee believes that at this stage
15 in his examination, that the examination should proceed
16 on a private basis. Thank you.

17 THE COURT: Mr. Feinstein?

18 MR. FEINSTEIN: Larry Feinstein, attorney for
19 the debtor. The debtor also would request that the
20 proceedings remain sealed or that the press not be
21 invited. This is an ancillary proceeding, but it's
22 still given under bankruptcy rule 2004, which means
23 that the trustee may question the debtor regarding his
24 financial affairs, where he banks, what his bank
25 records are, what his account numbers are, what kind of

1 credit cards does he have, what card numbers, where
2 does he live, where does he work. And those are all
3 kinds of things that, because of the nature of this
4 proceeding, the third parties -- not necessarily the
5 press, but third parties could utilize that would not
6 be to the benefit of the debtor, the estate or the
7 trustee. So we're requesting that they be excluded.

8 We're also going to reserve the right, if the
9 Court does allow the press to make a motion to
10 intervene at a subsequent point in time and obtain a
11 transcript, that we would be asked the right to be able
12 to go through and redact things that give out personal
13 information like that as well. So it's not before the
14 Court today, but we're asking that we're going to keep
15 that, you know, as part of our proceeding.

16 THE COURT: Well, let me say to the press --
17 well, I guess I should ask the various press
18 representatives, Ms. Armstrong, Ms. Crosby -- Cross or
19 Crosby?

20 MS. CROSBY: Crosby.

21 THE COURT: Sorry -- and Mr. Duffy, do you
22 see any -- is there any prejudice to allowing the
23 examination to go forward on a closed basis with the
24 possibility that you might obtain a transcript later,
25 perhaps less account numbers and precise addresses?

1 MS. ARMSTRONG: That would be fine. I mean,
2 I'd like to have a copy of the transcript.

3 THE COURT: That's Ms. Crosby. And you're
4 with CHEK --

5 MS. ARMSTRONG: No, sorry, I'm Ms. Armstrong.

6 THE COURT: I'm sorry, I got you reversed.

7 MS. ARMSTRONG: We're right beside each
8 other.

9 MS. CROSBY: I'm Ms. Crosby, and I'm with
10 CHEK News. Personally, we'd prefer to be in the
11 proceeding if we can. A transcript doesn't necessarily
12 give the full indication of what's going on. This is a
13 case of some great public interest.

14 THE COURT: Yeah, I'm aware -- when this
15 surfaced Thursday, it took me about two minutes on the
16 internet to see why there might be substantial public
17 interest, particularly on the Canadian side of the
18 border.

19 MS. CROSBY: And of course, we'd be -- you
20 know, we have no interest in publishing Mr. Thow's bank
21 numbers, bank account numbers or anything like that.

22 THE COURT: Mr. Duffy, anything different
23 from your perspective?

24 MR. DUFFY: Well, I absolutely agree with
25 Ms. Crosby, we'd prefer to be there and get the tenor

1 of the examination, obviously. And we have absolutely
2 no problem not publishing personal information, credit
3 card numbers and that kind of thing.

4 THE COURT: Counsel have anything further to
5 say on the subject?

6 MR. FEINSTEIN: Just the problem, of course,
7 I pointed out to the Court in chambers, is the
8 enforcement provision of your agreement to publish.
9 The Court doesn't have contempt proceedings in Canada.
10 So if you violate it, there's nothing we can do to
11 unring the bell. So we'll put that in the record.

12 THE COURT: Mr. Leaverton, anything further?

13 MR. LEAVERTON: No, Your Honor.

14 THE COURT: Okay. Well, I think in the
15 circumstances, I know it has taken some time to
16 organize this proceeding. If you look at the docket,
17 there have been motions going back several months now.
18 My instinct is that there is not a significant
19 prejudice in allowing the examination to go forward on
20 a closed basis today. If the various press
21 representatives or your organizations want to move to
22 intervene and then seek a transcript, a noticed motion
23 to that effect would be appropriate.

24 I would point out to all parties, a good -- a
25 very useful case for starting the analysis is In Re

1 Symington. It's S-y-m-i-n-g-t-o-n. And the citation
2 is 209 Bankruptcy Reporter 678. It's a bankruptcy
3 court case from Maryland in 1997. But although it's
4 from Maryland, it relates to the then pending
5 bankruptcy of the governor of Arizona who was also
6 under indictment for bankruptcy fraud at the time. And
7 it was related to an examination of, it turned out to
8 be not the debtor's mother, but her personal
9 representative because she had died between the
10 issuance of the subpoena and the date of the opinion
11 that I've just referenced.

12 But it has a great deal of the history and
13 background of 2004 examinations and how they relate to
14 civil discovery and how they might differ from civil
15 discovery. I'm agnostic on that point on whether or
16 not that's the right answer. There are contrary
17 decisions, and so that's exactly why I didn't want to
18 make a final decision today.

19 So if any of the press wants to move to
20 intervene and wants to seek -- wants to make a motion
21 to have the transcript, I'll consider that in the
22 normal course of things.

23 I would point out that, although I don't -- I
24 assume that all of your organizations know that in
25 federal courts in the United States, corporate entities

1 need to be represented by counsel. So I assume that
2 that's not a major hurdle for any of your
3 organizations.

4 So is there anything further we should do at
5 this point?

6 MR. LEAVERTON: Nothing from the trustee,
7 Your Honor.

8 THE COURT: All right. So I guess proceed
9 with the examination, and if difficulties arise, we can
10 have the appropriate hearing.

11 MR. LEAVERTON: Thank you.

12 (Court was recessed.)

13

14 THE COURT: Well, good afternoon. We're here
15 again on the Thow matter. Mr. Leaverton is there.

16 MR. LEAVERTON: Bruce Leaverton representing
17 the Canadian trustee, Your Honor. We have gone as far
18 as we can go. We have two matters to resolve before we
19 can complete the examination. One is the -- in
20 particular, the bank documents that were subject of the
21 stipulated order which attaches a subpoena and
22 describes a number of documents that Mr. Thow was to
23 provide us. We have some but not all of those records.

24 In particular, we have, for example, Wells
25 Fargo bank account records that don't include the

1 calendar year 2007. They stop at 2006. He has bank
2 accounts with two or three other institutions where he
3 provided the records that he could get off-line, you
4 know, on the internet, which is approximately a
5 six-month period.

6 THE COURT: So recent but not historical.

7 MR. LEAVERTON: Correct. And I believe the
8 trustee would prefer to proceed by way of subpoena
9 against those institutions that are now disclosed as
10 places where he has bank accounts. And so we'd like to
11 resume the examination once we obtain those materials.

12 The other matter that's coming before us as
13 an obstacle is the Fifth Amendment has been asserted by
14 Mr. Thow's criminal counsel in response to a number of
15 inquiries. The parties have a dispute regarding the
16 vitality of the privilege in view of the two bankruptcy
17 filings, the sworn materials submitted in those
18 bankruptcy filings, Mr. Thow's prior stipulations and
19 responses to written questions and his testimony today
20 and other factors.

21 So the situation is that the trustee is
22 content with not -- not trying to resolve that matter
23 here and now today, those Fifth Amendment issues. But
24 the objection has been interposed, and the witness has
25 been instructed not to answer, and we don't have

1 answers to those questions. So we would propose that
2 we would -- I suppose the proper procedure would be a
3 motion to compel responses to those questions that
4 are --

5 THE COURT: Okay. So maybe -- I thought I
6 understood you to say you were content -- or the
7 trustee was content not to have answers or content to
8 conclude today without those answers?

9 MR. LEAVERTON: The latter, Your Honor. The
10 situation is that we're going to have to get the bank
11 records to complete the examination anyway. And
12 although there, as you know, substantial briefing in
13 the record on the Fifth Amendment issue and the like --
14 and unless -- I mean, we certainly would welcome the
15 Court ruling today.

16 And I can tell you, really, where the rubber
17 meets the road on these issues. There's a banking
18 institution in Jamaica that involved a number of
19 pre-bankruptcy activities involving this debtor. And
20 there are, in the record established today, several
21 occasions where the debtor has been to Jamaica on
22 several occasions since August of 2005 when he came to
23 this country. And our examination of the witness on
24 questions concerning property owned in Jamaica, the
25 Bank of Jamaica, accounts in the Bank of Jamaica --

1 THE COURT: Is that the name of the bank? Or
2 is that just a bank in Jamaica?

3 UNIDENTIFIED SPEAKER: It's the National
4 Commercial Bank of Jamaica.

5 MR. LEAVERTON: National Commercial Bank of
6 Jamaica is the name of the institution. And that
7 really is an important area for the trustee's inquiry.
8 That's where the parties have a dispute as to whether
9 the Fifth Amendment has vitality or not.

10 There is a further complication, which
11 actually, Mr. Thow's criminal counsel may be able to
12 address regarding -- I believe there are Canadian rules
13 -- they don't have a Fifth Amendment, but they have
14 something similar.

15 THE COURT: I know, the Canadian Charter of
16 Rights, I think it's called.

17 MR. LEAVERTON: Right.

18 THE COURT: I believe it's -- I have some
19 very sketchy knowledge of that.

20 MR. LEAVERTON: But apparently, the procedure
21 is that you can assert the right, and then you're
22 required to answer the question anyway. But the answer
23 can't be used in a criminal prosecution, unlike our
24 procedure. And so one of the interesting questions is
25 whether that regime, the Canadian approach in law and

1 rights really apply to this proceeding, or whether it's
2 the Fifth Amendment or both or neither. Well,
3 certainly one or the other does, and maybe both.

4 So those are the issues that we would --

5 THE COURT: I haven't heard one way or the
6 other -- and I'm not pressing counsel for a response --
7 but whether or not there are potential U.S. criminal
8 proceedings or actual U.S. investigations proceeding
9 that may make a difference in the answer to that
10 question.

11 MR. LEAVERTON: I think if I knew the answer
12 to the question, I'm not sure I could say whether there
13 was a criminal proceeding. But I know there -- or an
14 investigation. But I know there's no proceeding
15 pending. There's no prosecution or indictment.

16 THE COURT: Okay. Ms. Feinstein or
17 Ms. Riley?

18 MS. RILEY: Thank you, Your Honor. Again,
19 Jessica Riley appearing on behalf of the debtor
20 specifically, as this matter pertains to his criminal
21 liability in Canada.

22 Mr. Leaverton, I believe, addresssed the two
23 issues that involve my representation. Number One,
24 whether or not -- it is our belief that Mr. Thow has
25 the right to invoke the Fifth Amendment in this

1 proceeding based on the risk of prosecution in a
2 foreign territory, that being Canada. There is an
3 investigation -- a criminal investigation there that
4 has been completed and referred to the Crown. And it
5 is our understanding -- my understanding from
6 conversing with his attorneys in Canada that charges
7 there are imminent. The process is just a little bit
8 slower -- or it's taking its time. And my guess is
9 that is because it's --

10 THE COURT: Probably a pretty complex case.

11 MS. RILEY: It's a complex case. It's not a
12 serious violent crime where we run out and arrest
13 people immediately. So they're taking their time to
14 determine what criminal charges, if any, are
15 appropriate.

16 Fifth Amendment aside, in conferring with his
17 Canadian counsel, I brought the issue up with
18 Mr. Leaverton and the attorneys regarding whether or
19 not what arm of law governs this proceeding. Because
20 if, in fact, we are going to say that the Canadian law
21 controls, Mr. Thow may be able to answer a number of
22 these questions while maintaining protections --
23 protection of himself from criminal liability in the
24 Canadian courts.

25 So I guess I'm asking for leave of this Court

1 for us to be able to address this issue. It's
2 obviously a very complex one. It probably doesn't come
3 before Your Honor very often.

4 THE COURT: "Never" would be an accurate
5 description. I tell you, my last involvement with
6 Canadian justice was when I was a deputy prosecutor in
7 Pierce County -- which is a long time ago -- and a
8 Canadian soldier, who was on duty at Fort Lewis in some
9 kind of exercise, turned a truck down an on-ramp to
10 I-5. And of course, there was a very drunk soldier
11 coming up the on-ramp. Luckily, nobody was very much
12 injured. The state patrol trooper wrote a ticket.

13 You know, I was just the deputy prosecutor
14 assigned, and suddenly I get a letter from a colonel in
15 and Esquimalt or someplace like that saying, You can't
16 prosecute under the NATO Status of Forces Agreement.
17 So I looked at it and said, I think you're right and,
18 you know, please tell us what happened. We would have
19 fined him, but, you know, had we convicted him. And he
20 ended up spending a couple of days in jail, apparently.

21 So I don't know if that's relevant in the
22 slightest, but I have had a very slight involvement
23 with Canadian criminal -- Canadian military justice
24 anyway.

25 MS. RILEY: I believe we will do our best to

1 untangle it for you.

2 THE COURT: Well, I'm not sure what to say
3 today. I'm not ready to make any kind of rulings at
4 this point. I think I probably would want to see the
5 questions framed in terms of pleadings and, you know,
6 with the specific aspects sort of laid out. Because
7 I'm not quite sure -- I take it, from what
8 Mr. Leaverton said, you're going to want to get
9 documents from the financial institutions. That's
10 likely to take some time. So we're probably looking at
11 least a couple of months out before we get to this? Or
12 do you know?

13 MR. LEAVERTON: Well, I know the -- I'm
14 certain that Mr. Cheevers would like it to be on a
15 faster track than a couple of months.

16 THE COURT: Sure. Well, I guess that's a
17 question. Are these two so interrelated that we should
18 resolve the Fifth Amendment and testimony kind of
19 questions before we get -- well, are there questions
20 with respect to the bank records other than you just
21 needing time to get them?

22 MR. LEAVERTON: I don't believe that
23 Mr. Thow's counsel objects to our subpoenaing the bank
24 records and obtaining them. And so that's just a
25 matter of getting the subpoenas out into the banks. I

1 know we'll get responses pretty rapidly. We're really
2 looking at the electronically-maintained bank records,
3 and we're not really going to look into --

4 THE COURT: You're not looking for copies of
5 checks, et cetera, at this point.

6 MR. LEAVERTON: Correct. So I think that
7 will go fairly rapidly. I think, as I say, probably
8 the burden is on me to move to compel responses and to
9 provide the Court with the questions and the
10 objections. And then I'm certain that Mr. Thow's
11 counsel will want to have the Court determine the
12 Canadian -- the choice of law issue, if that's
13 possible, in that kind after motion.

14 THE COURT: Well, in that regard, the choice
15 of law question, particularly involving criminal
16 matters, do I need to -- does someone need to ask the
17 Department of Justice to take a position?

18 MS. RILEY: If I may respond, Your Honor?

19 THE COURT: Sure.

20 MS. RILEY: I don't believe that's
21 necessarily the issue, because we're not -- the
22 question isn't whether it's Canadian criminal law
23 versus American criminal law. It's what sovereign
24 nation is governing this bankruptcy and what laws apply
25 to this bankruptcy. It's, I think, the overreaching

1 issue. And if it's Canadian law --

2 THE COURT: Well, let me pose a hypothetical.

3 MS. RILEY: Sure.

4 THE COURT: Say the outcome of --

5 Mr. Leaverton makes his motion, and the outcome is

6 everybody here thinks, well, the Canadian procedure

7 governs, and I order that he answer the questions. He

8 answers the question, and six months later, we don't

9 know why, but there's a grand jury indictment against

10 Mr. Thow in the United States for something. The

11 possibility then is my ruling might have been wrong,

12 and nobody involved in the prosecution, you know, with

13 an interest on the part of the Government or whoever's

14 prosecuting, whichever government it is, probably has a

15 fair shot at that question again.

16 And I don't know if there's a way to preclude

17 that, or whether it's a take-your-chances situation no

18 matter what we do. But one of the possibilities is

19 this is a brand-new statute, and maybe the Justice

20 Department wants to weigh in on that question. I don't

21 know. This is, literally, the first Chapter 15.

22 MR. LEAVERTON: Right. We could certainly

23 notify the Department of Justice of the motion and put

24 them on notice and put the Canadian authorities as

25 well, for that matter, on notice.

1 MS. RILEY: And I do think --

2 THE COURT: I mean, I'm not trying to make
3 this more complicated than it is. But I'm trying to
4 think through what the possible implications are before
5 we get too far down the road.

6 MS. RILEY: From my conversations with
7 Mr. Thow's Canadian criminal defense attorney, I don't
8 believe that there is any possibility of prosecution in
9 the United States. That could be wrong, obviously.
10 I'm not giving a definitive answer to the Court. But
11 that has been my understanding, which is why the case
12 has now been forwarded to the Crown.

13 We anticipate there should be something
14 definitive very shortly with regards to criminal
15 charges.

16 THE COURT: And "forwarded to the Crown"
17 means the prosecution service has decided whether or
18 not to bring charges.

19 MS. RILEY: Exactly. "Forwarded to the
20 Crown" means it has left the Mounties, which would be
21 the police agency investigating the case. They've
22 packaged it up and passed it on to the prosecutor.

23 THE COURT: The equivalent of the FBI sending
24 something to the U.S. Attorney.

25 MS. RILEY: Exactly. So the case is with

1 them. And from my conversations with his defense
2 attorney in Canada -- and I will readdress this issue
3 -- I don't believe there's any criminal liability here
4 in the United States. But obviously, before we go
5 forward, I'll get something more definitive on that.

6 THE COURT: Well, my hazarding of the idea of
7 a couple of months was just that I assumed that's how
8 long it was going to take to be getting bank records.
9 But I'm not -- whenever it's ready, we will do it. I
10 mean, if you want to note up a motion, we can do it,
11 you know. And if it has to be expedited, you know, we
12 can do that to some extent. But if it really needs
13 notice to other folks who aren't here, it would
14 probably be appropriate to figure out who those folks
15 are.

16 MR. LEAVERTON: Right. I think that's, you
17 know, probably, to be discrete, that's probably
18 Mr. Thow's issue and not the trustee's issue --

19 THE COURT: Sure.

20 MR. LEAVERTON: -- as far as involving other
21 governmental agencies.

22 THE COURT: If there's any concern about
23 that.

24 MR. LEAVERTON: Right. So, you know, we'll
25 confer, counsel and I, and see if we can get it

1 resolved. If she doesn't have an issue, then we'll
2 present it, you know --

3 THE COURT: Sure, that's fine.

4 MR. LEAVERTON: And if she has an issue, then
5 we'll have to address that as far as --

6 THE COURT: And one of the complicating
7 factors, if there is any interest on the part of the
8 Government, is it will take them a while to respond
9 because they'll probably want to respond out of D.C.

10 MR. LEAVERTON: Right. Then we're talking
11 several months.

12 THE COURT: Well, they can do some things in
13 a hurry back there.

14 MR. LEAVERTON: That's true.

15 THE COURT: So I think where we are is that
16 there will be a motion sometime soon on the answering
17 the questions issue, and perhaps later on the bank
18 records. And perhaps not. Perhaps just simply a
19 reconvening of the 2004 exam on that.

20 MR. LEAVERTON: I think just to make the
21 record clear, we're comfortable, I think, all of us,
22 that the 2004 order covers subpoenaing the bank records
23 from Washington Mutual and from Key Bank. And I
24 believe there's one other institution. And then Wells
25 Fargo getting 2007 documents. So those subpoenas will

1 go out very rapidly. And then I think it's the fifth
2 Amendment and the Canadian counterpart issue.

3 THE COURT: All right. We'll be at recess.

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CERTIFICATE

ROBYN OLESON FIEDLER certifies that:

The foregoing pages represent an accurate and complete transcript of the entire record of the digitally-recorded proceedings before the HONORABLE PHILIP H. BRANDT presiding, in the matter of THOW; and

These pages constitute the original or a true copy of the original transcript of the proceedings.

Signed and dated this 26th day of November, 2007.

AHEARN & ASSOCIATES

by |s| Robyn Oleson Fiedler
ROBYN OLESON FIEDLER, Notary
Public in and for the State of
Washington, residing at Buckley.